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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Better Monkey Grip Company, respectfully petitions this Honorable Court for a writ of certiorari to review the opinion and decree of the Court of Appeals for the Fifth Circuit, entered on May 1 and June 18, 1957, ordering enforcement of a decision and order of the National Labor Relations Board issued against Petitioner on April 30, 1956.

OPINIONS BELOW

The *per curiam* opinion of the court below, a copy of which is set forth in the Appendix, *infra*, p. 57, is reported at *243 F. 2d 836*. Copies of the decree entered by the court below and the court's order overruling Petitioner's petition for rehearing and reargument are also set forth in the Appendix. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 202-207),[1] a copy of which is set forth in the Appendix, *infra*, p. 43, is reported at 115 N. L. R. B. 1170-83.

JURISDICTION

The decree of the court below was entered on June 18, 1957, after the court had denied Petitioner's request for rehearing and reargument on May 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, hereinafter referred to as the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C., Sec. 151, et seq.), are Sections 8(a) (1), 8(a) (4), and 10(c), (d) and (e). Copies of these Sections are set forth in the Appendix, *infra*, p. 41.

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[1]The references designated "R." refer to the numbers appearing in bold face type, singly, on separate lines of the "Transcript of Record," printed as Volume I. References designated "J. A." refer to numbers appearing in bold face type, singly, on separate lines of the testimony and exhibits printed as a joint appendix.

QUESTIONS PRESENTED

QUESTION 1

Whether the court erred in finding that the Board's conclusion that petitioner discharged Whaley, a supervisor, for giving testimony adverse to its interests at a prior board hearing is supported by substantial evidence on the record as a whole.

QUESTION 2

Whether the court erred in refusing to remand these proceedings to the Board under Section 10(e) of the Act for the purpose of taking additional testimony.

QUESTION 3

Whether the court erred in finding that Petitioner's conduct in terminating Whaley's employment constitutes an independent violation of Section 8(a)(1) of the Act.

QUESTION 4

Whether the court erred in denying Petitioner's request that the Board's order, which orders full and immediate reinstatement to Whaley in his former or a substantially equivalent position, be modified to provide that such reinstatement be contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work.

QUESTION 5

Whether the court, under the record facts, erred in entering the decree ordering Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the N. L. R. B.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

In its decision and order the Board found that Petitioner had terminated the employment of a supervisory employee, Whaley, because he had given testimony adverse to its interests in a prior Board hearing, and that such conduct violated Section 8(a)(1) of the Act. In defense of its action, Petitioner alleged that Whaley's services were generally unsatisfactory and that he was physically incapable of properly performing his duties (R. 162). Whaley readily admitted that he was injured while working for Petitioner, that such injury occurred approximately ten days prior to his termination, and that he instituted a workman's compensation suit against Petitioner's insurance carrier based on such injuries.

Whaley, a supervisor, testified at a prior Board hearing held on July 17 and 19, 1954, that he overheard Petitioner's plant manager, Jack Everett, make certain anti-union statements. The trial examiner in this prior case issued his intermediate report on August 21, 1954, and on three dates thereafter, September 7 and 8, 1954, and January 28, 1955,

the matter of the truthfulness of Whaley's testimony given at the hearing and the nature of the statements attributed to Jack Everett were the subject of discussion between Petitioner and Whaley, and upon the conclusion of such discussions Whaley was asked if he would tell the truth and thus change his prior testimony. This prior case was remanded to the Board's regional office for the taking of additional testimony, and a rehearing was held on January 28, 1955. Approximately three weeks later, February 18, 1955, Whaley received a letter terminating his employment because his services were presently unsatisfactory. The trial examiner concluded that supervisor Whaley "was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act" (R. 168), and found that such conduct by Petitioner violated Section 8(a) (4) and (1) of the Act. The Board adopted the trial examiner's factual findings, but concluded that Petitioner had violated Section 8(a) (1) of the Act only, stating that "as the remedy would be the same, we find it unnecessary to consider whether the discharge also violated Section 8(a) (4) of the Act." (R. 203.) The Board's order, *inter alia*, ordered Petitioner to offer Whaley full and immediate reinstatement and to make him whole for any loss of pay he may have suffered. The Board, however, fully recognizing that Whaley suffered a back injury shortly before his termination and the likelihood that he was physically unable to perform his required job

duties at the time of such termination, provided that "back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties" (R. 205, 204). The Board's order, did not, however, provide that Whaley's reinstatement was to be made conditional upon his physically being able to perform required duties. Rather, the Board's order dictated that Whaley, regardless of physical condition, be immediately reinstated.

On July 23, 1956, following the Board's decision and order, Petitioner, on the basis of evidence which it had no reason to know existed at the time of the hearing before the Board, submitted to the Board a petition for reconsideration and, in the alternative, motion for remand for the purpose of adducing additional evidence on the question of whether Whaley was in fact terminated because of the physical injuries suffered prior to his termination. In support of such petition and alternative motion, and attached thereto as exhibits, Petitioner submitted true copies of the pages of sworn testimony taken by the official court reporter of the Texas state district court in the workman's compensation suit filed by Whaley (R. 244-249).

Thereafter, on August 10, 1956, the Board denied Petitioner's petition for reconsideration on the ground that "Nothing has been advanced that was not properly considered by the Board," and likewise denied its alternative motion for remand because it only "related to a question of compliance and is therefore premature at this time."

(R. 250.) On April 9, 1957, the case was heard before the court below. The Court by *per curiam* opinion ordered the Board's order enforced.

PRESENTATION OF QUESTIONS

QUESTION 1—(Restated)

Whether the court erred in finding that the Board's conclusion that petitioner discharged Whaley, a supervisor, for giving testimony adverse to its interests at a prior board hearing is supported by substantial evidence on the record as a whole.

The Board's General Counsel, in his attempt to prove the allegations set forth in the complaint, called one and only one witness, namely, Robert L. Whaley. Whaley's testimony, which therefore constitutes the entire testimony offered in proof of the General Counsel's case, if credited in its entirety, merely discloses the following:

(1) That Whaley was employed by Petitioner as a warehouse foreman; that his employment was terminated on February 18, 1955, for the reason, as expressed in a letter to Whaley, that his employment was "presently unsatisfactory to management" (J. A. 13, 25-27, 253);

(2) That in or about March, 1954, while employed in a supervisory position, Whaley became interested in a labor union and became a member thereof (J. A. 13-14, 27-38);

(3) That in April, 1954, Whaley talked to L. M. Everett, Sr., who was Petitioner's president at the time, concerning his relationship with the union and that, according to Whaley's testimony, "he told me that he didn't know why we did want to go (union), but if we did he would be willing to go along with it"; that Whaley informed L. M. Everett, Sr., that he was in favor of the union (J. A. 14);

(4) That Thomas Everett, Petitioner's president at the date of the hearing, told Whaley, in response to a statement by Whaley that he thought he would be fired for engaging in union activities, that nobody would be fired because they were in a union. This conversation developed during a conference between Thomas Everett and Whaley wherein Evertt admonished Whaley for spreading false rumors that the Petitioner was ruining his health and asked that Whaley stop making such statements (J. A. 36-37);

(5) That Whaley testified in the proceedings before the Board on July 17, 1954, that he *overheard* a conversation between Jack Everett, plant manager, and Garland Talley, another supervisory employee, in which Jack Everett allegedly made a remark that "he would fire everyone that signed a union card if it took him ten years to do it and that he had a good memory"; that approximately three days after overhearing this conversation, he again *overheard* Jack Everett make a remark that he knew three of the six leaders that started the union activities and that if he knew the other three he would "let them go now" (J. A. 15-22). This testimony is wholly uncorroborated.

(6) That on July 21, 1954, subsequent to his talk with Thomas Everett, wherein Thomas Everett told Whaley he wanted the untrue rumors Whaley was spreading to the effect that the Petitioner was ruining his health stopped, Jack Everett addressed a letter to Whaley which read as follows (J. A. 28-29, 76-77; R. 254):

> "It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.
>
> "These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.
>
> "We feel that these malicious statements are harmful to the company and employees to the extent that we must insist that they be stopped.
>
> "Any repetition of such actions will force us to request your resignation."

Whaley admitted complaints had been made "about what I had talked about going through the plant" (J. A. 26).

(7) That Whaley, an active union adherent and member (J. A. 13-14, 27-28), testified when asked, "You were fighting management pretty much weren't you," "I don't think so, not too much" (J. A. 38). This statement must on its face be construed as an overt admission that he was at odds and ends with or fighting management officials.

(8) That on September 7, 1954, during the period between the first hearing before the Board in Case No. 16-C.A.-742 in July, 1954, and the second hearing in Janu-

ary, 1955, L. M. Everett, Sr., the Petitioner's president, called Whaley in and attempted to find out whether the statement attributed to Jack Everett by Whaley that he would fire everyone who signed a union card was actually made; that L. M. Everett, Sr., did not believe such statement had been made; that L. M. Everett, Sr., did not ask him to lie about the matter; that on the following day L. M. Everett, Sr., again called Whaley in so that Petitioner's counsel could talk to him; that in the discussion that followed Petitioner's counsel, in Whaley's own words, "kept on wanting to tell him the *truth*" (Emphasis added) about the situation and inquired of him whether he wished to change his statement; that nothing else was said to him on the subject until the day before the hearing in January, 1955, when he was again asked by Petitioner's counsel if he would consider changing his statement; that nothing more was ever said to him about the matter (J. A. 22-25; R. 74-75);

(9) That L. M. Everett, Jr., called to Whaley's attention errors in the reports which Whaley was responsible for keeping; that L. M. Everett, Jr., called his attention to these errors on more than one occasion; and that Whaley, in effect, admitted making such mistakes (J. A. 77-80);

(10) That after the termination of his services, Whaley, through his attorney, filed a workman's compensation suit claiming a "permanent disability" (J. A. 36; 256-263); that, on occasion, in the performance of his duties Whaley was required to handle heavy bales of rubber (J. A. 33; 38).

(11) That Whaley testified at a N. L. R. B. hearing under subpoena on January 28, 1955. No testimony is in the record as to *what* he testified at this hearing (J. A. 15).

As set forth in the trial examiner's intermediate report (R. 162), Petitioner contends Whaley's services were terminated for cause—that he had become an unsatisfactory employee because of his antagonistic attitude toward management; that he made mistakes and errors in the performance of his record keeping responsibilities; that he spread untrue rumors detrimental to management; and that he was apparently physically and mentally unable to handle his job.

Petitioner respectfully contends that the General Counsel, through the uncorroborated testimony of its only witness, Whaley, has failed to prove a prima facie case that Whaley was discharged because he gave testimony adverse to the interests of the Petitioner. Petitioner further urges that a review of the record testimony will reveal that the findings, conclusions and order of the Board are not supported by substantial evidence on the record as a whole.

At the hearing Petitioner, in defense of its conduct and the charges made against it, presented the following evidence:

(1) That Thomas Everett, Petitioner's president at the time of the hearing, found it necessary to talk to Whaley in March or April, 1954, about the untruths, false rumors and statements Whaley was circulating in the plant prior to the election in the representation case; that during this conversation Whaley admitted spreading certain rumors and tales (J. A. 82-85).

(2) That according to the uncontradicted testimony of L. M. Everett, Jr., the Petitioner's operational manager and purchasing agent who was one of Whaley's immediate supervisors, he called Whaley's attention to mistakes many times, that the number of mistakes committed by Whaley during the last two or three months of his employment increased to the extent of being a nuisance, and that these errors were one of the factors considered in discharging Whaley (J. A. 110-111).

(3) That, as indicated herein, on July 21, 1954, Jack Everett, Petitioner's plant manager, having heard about Whaley's conduct and the statements spread among the employees, found it necessary to write Whaley about his untrue statements concerning the N. L. R. B. hearing to the effect that he (Whaley) had licked the company; that in this letter Everett informed Whaley that his malicious statements were harmful to both the company and the employees (J. A. 76-77; 254).

(4) Altha Lucille Cribbs, who has been employed by Petitioner for 8 years and who during such period of time has been acquainted with Whaley, testified that Whaley did not have a reputation for truth and honesty in the plant, but, rather, that he had a reputation for not telling the truth; that Whaley made the statement, after a hearing before the Board, to her and an Opal McElroy that "if the union hadn't helped any way, it had brought us a raise on the next pay check." No such raise was given (J. A. 55-57).

(5) Lila Belle Magee testified that a few days after Whaley's remark to Cribbs about the "raise," Cribbs told her about his statement (J. A. 66-68).

(6) That the decision to terminate Whaley's employment resulted from a conference between L. M. Everett, Sr., L. M. Everett, Jr., and Thomas Everett; that such decision was the "summation" of several factors: (1) mistakes and errors made in the discharge of his responsibilities, (2) his overall attitude, (3) his disturbing and disruptive influence within the plant, (4) the fact that he was antagonistic toward management to the extent he could not carry out his responsibilities as a supervisor, and (5) his physical inability to properly handle his duties (J. A. 86-88).

(7) That L. M. Everett, Jr.'s, testimony corroborated the testimony given by Thomas Everett that the decision to terminate the employment of Whaley resulted from a conference in which they discussed: (1) his physical ineptness and general attitude, (2) the need for harmonious relations among the employees as a group, (3) Whaley's apparent inability to command the respect of his fellow employees, and (4) the fact that he actually irritated the other employees in one way or another such as the false rumors and so forth" (J. A. 111-115; 86-88).

The testimony as to Whaley's physical inability to perform his duties was denied by him, but was corroborated by his petition for workman's compensation wherein he alleged his physical disability to perform any work, the injury having occurred approximately 10 days prior to his discharge. (J. A. 256-263; 32, 38.)

Petitioner respectfully urges that the substantial evidence on the record as a whole does not permit the conclusion that Whaley was discharged because he gave testimony adverse to Petitioner's interest at a Board hearing because:

(1) Whaley was not discharged until six months after such testimony was first given, and then not until the subsequent occurrence of several overt acts which in fact made his services unsatisfactory, i. e., (1) the spreading of false rumors adverse to his employer on two occasions; (2) more frequent errors in the keeping of records of incoming and outgoing materials; (3) his becoming physically and mentally incapacitated to properly handle his supervisory job; and (4) his development of an antagonistic attitude toward management to the extent that he could not carry out his supervisory responsibilities.

The question has come to mind a thousand times whether any magistrate, judge or justice who had heard or read the record in this case would wait so long and bear so much as Petitioner has from some person employed by one of them in a position of trust. The Board and the court below have placed little significance on the fact that Whaley, beyond dispute, spread false rumors to the detriment of his employer. Would the magistrates and judges who have heard and studied this case take so lightly false rumor-spreading by a trusted supervisor employee, should such employee in a position of trust conduct such a campaign against one of them? Petitioner feels that disloyalty of an employee in a position of trust is the most serious act

which could be committed, and warrants and demands discharge without further reason. Petitioner was tolerant in the extreme.

(2) Whaley's testimony constitutes the entire case of General Counsel; yet Whaley is completely discredited by reason of his admission in his workman's compensation suit that he was permanently and totally disabled from performing any manual work or labor whatsoever, because he testified in the case at bar that he was physically able to perform his duties at the time of discharge, and part of his duties consisted of lifting heavy bales of rubber. Petitioner urges that Whaley is bound by the allegations set out in the petition in his workman's compensation suit that he was unable to perform his duties of employment from the time of his injuries which occurred just prior to his discharge.

The crux of this case is the trial examiner's erroneous credibility finding which is premised entirely on his belief —and it is specifically noted that *no* legal authorities are cited in support of such belief—that Whaley's credibility is not impaired by the claims and statements made in the pleading filed in his workman's compensation suit, and that the allegations set forth therein do not constitute admissions against his interest. Rather, the trial examiner strangely concluded on the basis of Whaley's demeanor, that he was "ready, able and willing" to perform his duties. (R. 166-167.) The law is well established that the statements contained in a pleading filed by an attorney duly employed for such purpose constitute admissions which may later be used in subsequent legal causes by persons who

were strangers to the primary suit. Such rule is clearly set out in *41 Am. Juris., p. 435; 14 A. L. R. 36; McCormick & Ray, Law of Evidence, Vol. 2, page 62; 20 Am. Juris., pp. 501 and 539; 5 Am. Juris., 311-312; 14 A. L. R. 56; 90 A. L. R. 1398; White v. Mechanics Securities Corp. 269 U. S. 283;* and the voluminous cases cited therein. See also *7 C. J. S., pp. 920-921; 31 C. J. S., pp. 1071-1077; 71 C. J. S., pp. 147-152;* and the voluminous cases cited therein. Thus, the trial examiner's conclusion, which the Board and the court apparently adopted, that the admissions contained in the workman's compensation suit do not affect Whaley's credibility is clearly erroneous. Therefore, the very basis, i. e., Whaley's credibility, on which the trial examiner predicates his ultimate unfair labor practice findings must be deemed erroneous.

(3) Other than the uncorroborated testimony of Whaley as to the alleged statement of Jack Everett, the record is completely devoid of evidence that there existed any anti-union attitude on the part of management, or that any employee, Whaley included, suffered a single act of discrimination because of union activity. Whaley himself testified that Mr. Everett, Sr., the president of Petitioner, knew of his union sympathies ten months before his discharge, yet he did not even so much as remind Whaley of his duty to be loyal to management's policies.

(4) The trial examiner found that Whaley was discharged because of his known views concerning the union, *and* because he testified in a proceeding under the Act (R. 168). The *first* finding is that he was discharged be-

cause of his known views concerning the union. If this finding of the trial examiner is correct, the Act permits the discharge. If, as the Board has held, the conclusion is that he was discharged only because of his testimony given before the Board at a prior hearing, such conclusion is just as unsupported by substantial evidence as the former conclusion that he was discharged for union sympathies and activities. It is very obvious that the trial examiner, determined to rule in Whaley's favor recited first what he considered the primary reason for his discharge. The primary reason which occurred to him was Whaley's union activities. The conclusion is therefore inescapable that the trial examiner's findings herein are *colored* by the very fact that he believed Whaley was discharged because of his union activities. The Board, knowing that it is permissible under the Act to discharge a supervisor for engaging in union activities, clung to the trial examiner's secondary conclusion, i. e., Whaley was discharged for giving testimony at a Board hearing. Both the trial examiner and the Board ignored the substantial evidence on the record as a whole, which was overwhelmingly to the effect that Whaley was discharged for cause, viz., his services were unsatisfactory to Petitioner at the time of his discharge. Can it be doubted for an instant from a reading of the record in this case that Whaley's services were unsatisfactory to Petitioner? With the burden of proof being as it is on the General Counsel to prove that the discharge was for an illegal cause, is it not to be presumed that the discharge was caused by the fact that *Whaley's services were unsatisfactory*, as they indeed were. It cannot be presumed that when two

causes existed to discharge Whaley, one illegal and one sanctioned by law, that the illegal course was the one chosen by Petitioner.

The court, in *N. L. R. B. v. Houston Chronicle Pub. Co., 211 F. 2d 848, at 854-855 (C. A. 5)*, in passing upon the question of proper inferences drawn by the Board, stated as follows:

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of *genuine substance*. In our opinion, this is not such a case." (Emphasis added.)

The Court's attention is also directed to *Boeing Airplane Company v. N. L. R. B., 140 F. 2d 423, at 433 (C. A. 10)*, wherein the court expressed it thusly:

> "* * *. There are, however, certain fundamental standards which the Board is required to observe in the effectuation of the legislative purpose, one of which is the traditional rule against the presumption of liability or bad faith. Another is the requirement that the evidence relied upon to support the findings of the Board must be substantial—not a mere scintilla, and the inferences drawn must be reasonable inferences generated by the facts—not surmise and speculation." (Citations omitted.)

The courts fully recognize that the burden is "upon the Board to prove its charges by competent and credible evidence and not upon the petitioner to disprove them." *N. L. R. B. v. Reynolds & Manley Lumber Co., Inc., 212 F. 2d 155, 158 (C. A. 5), cert. den., 346 U. S. 877; N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 144-146 (C. A. 5).*

On the question of whether the Board's findings and conclusions are supported by substantial evidence on the record as a whole, the Court is respectfully requested to take cognizance of the fact that the trial examiner's, and likewise the Board's findings are in fact premised upon inference piled upon inference. Thus, the trial examiner and the Board, in reaching the conclusion that the reasons given by Petitioner for Whaley's discharge were mere pretext, inferred that Whaley's rumor-spreading activities, which Whaley did not expressly deny, were in effect over-exaggerated by Petitioner; inferred, although Whaley admitted making errors in the performance of his responsible record-keeping duties, that such mistakes were of little or no significance, notwithstanding the uncontradicted testimony of L. M. Everett, Jr., to the contrary; inferred, notwithstanding the admissions in the aforementioned pleading, that, by demeanor observation, Whaley was "ready, able, and willing to perform his duties." By reason of these preliminary inferences, the trial examiner and the Board further inferred that Whaley was discharged because of his prior adverse testimony. The rule is well established however that inference piled upon inference is not a substitute

for evidence. *Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, at 616-617 (C. A. 7).* While the Board has the power to draw inferences, such inferences must be "reasonable inferences," from the evidential facts developed at the hearing. *Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 74 S. Ct. 323; N. L. R. B. v. Sunset Minerals, Inc., 211 F. 2d 224, at 226 (C. A. 9).*

This Honorable Court, in its classic *Universal Camera Corp. v. N. L. R. B.* case, *340 U. S. 474,* in passing upon the power of the courts to determine whether a Board order is based upon substantial evidence, laid down the following rule:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record * * *.
>
> "* * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot *conscientiously* find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (Emphasis added.)

Petitioner therefore urges that General Counsel did not meet his burden of proof in the hearing before the Board,

as the record reflects; that the substantial evidence on the record as a whole does not support the conclusion that Whaley was discharged for having testified at the Board hearing in July, 1954, six months prior to his discharge; that the overwhelming record evidence is to the effect that Whaley, at the time of his termination, was not a satisfactory employee, and that under this record it must be persumed that he was terminated for the many serious reasons which made him an unsatisfactory employee.

Petitioner is fully cognizant of this Court's ruling in the *Universal Camera Corp.* case that "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." However, Petitioner believes that, due to the peculiar facts of this case, the "standard" spoken of by this Court in the *Universal Camera Corp.* case has been "misapprehended, or grossly misapplied" and that, therefore, this is the type of "rare instance" in which this Court should intervene.

QUESTION 2—(Restated)

Whether the court erred in refusing to remand these proceedings to the Board under Section 10(e) of the Act for the purpose of taking additional testimony.

As previously set forth herein, Petitioner, following the Board's decision and order did, on July 23, 1956, submit to the Board its petition for reconsideration and alternative motion for remand (R. 210-249), which the Board denied. One of the primary reasons for submitting such petition

and alternative motion was that new evidence had been discovered that Whaley had given perjured, or at least contradictory, testimony concerning his back injuries, either before the Board or in a sworn deposition taken in his workman's compensation suit filed against the Petitioner's insurance carrier. Evidence, in the form of the pleading in such suit, was already in the record containing admissions fully disclosing the seriousness of Whaley's physical injuries, and the Board had considered such evidence and found, notwithsanding the admissions contained therein, that it failed to impair Whaley's credibility as a witness. Petitioner was, therefore, not attempting to have the Board consider evidence of an entirely new and different nature, but, rather, that the Board consider newly discovered evidence of the same nature which would conclusively prove, by his own admission, that Whaley's physical condition impaired him in the performance of his duties and that his prior testimony to the contrary was not to be credited.

The importance of such newly discovered evidence cannot be over-emphasized. This evidence would have a twofold purpose; namely, (1) to further show that Whaley, the *sole witness for the Board*, related facts in his deposition in his workman's compensation case which were conflicting in the extreme with his testimony before the Board, and (2) to prove by Whaley, himself, that he was discharged because he was physically unable to perform the duties of

his employment,[2] as was testified to by two witnesses of Petitioner.

In attempting to get this evidence before the Board, Petitioner was operating without benefit of procedural guides, under either the Act or the Board's own official

[2]In the aforementioned deposition, in response to questions by the attorney for the insurance company, Whaley testified as follows relative to his ability to work after his injury, which was received just prior to his discharge, and relative to what he told the Unemployment Commission regarding his ability to work:

"Q. Did you have to tell them you were ready to go to work?

"A. Yes, sir.

"Q. Did you have to tell them you were willing to go to work?

"A. Yes, sir.

"Q. Did you have to tell them you were able to go to work?

"A. I was for light work; I asked for light work. I couldn't do heavy work." (J. A. 244).

Regarding the question of why Whaley was discharged, he testified (J. A. 248):

"Q. When did they fire you?

"A. Because I was getting crippled and wasn't able to do as much as they wanted me to, to start with.

"Q. When did they fire you?

"A. I don't remember the date exactly.

"Q. Well, was it just before you went over there for these employment benefits?

"A. Yes, sir.

"Q. You worked about a week after you claim you got hurt?

"A. No, a little bit longer than that, two or three weeks—two weeks, I think.

"Q. How did you get hurt?

"A. I was straightening up some skids with a fork truck and there was—has a metal bottom in it and when that gets damp or wet—something, it gets real slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful, you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped over against the sides—it has got ribs up and down it, you know, and it caught me right in the center of my back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions."

Rules and Regulations, and pursued what appeared to be the only available procedural course. Section 10(d) of the Act provided that, "Until a transcript of record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." The Board's official *Rules and Regulations*, containing its *Statements of Procedure*, do not, under the part thereof entitled *Procedure Before the Board, Secs. 102.48, 102.49, 102.50 and 102.51*, or under the part entitled *Motions, Sec. 102.24, 102.25, 102.26 and 102.27*, provide for or grant the right to file motions, petitions for reconsideration or similar requests after the Board has handed down a decision and order. Petitioner, in view of the clear provisions of the Act granting the Board the right to modify or set aside its findings and orders until a transcript is filed a court, submitted its petition for reconsideration and alternative motion, thereby placing before the Board evidence that Whaley, its sole witness, had given, under oath, testimony in his workman's compensation suit contrary to his testimony given at the Board hearing.

In its motion to remand, Petitioner also offered to show the Board that on November 7, 1955, a judgment was entered in the 14th Judicial District Court of Dallas County, Texas, which awarded Whaley the amount of $2,602.50, in settlement of his workman's compensation suit. Petitioner also pointed out, for the Board's enlightenment, that the amount of recovery had by Whaley

represented or was equal to, under the Texas workman's compensation law which allowed $25.00 a week for each week of disability, the amount an employee would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. As stated in *N. L. R. B. v. Vail Manufacturing Co., 158 F. 2d 664 (C. A. 7), cert. denied, 349 U. S. 905*, it is the duty of the court to also view events happening subsequent to alleged unlawful conduct which is the gravamen of a Board complaint.

Neither Petitioner nor its legal counsel was a party to Whaley's workman's compensation suit. At the time Whaley's suit was filed, June 2, 1955, several months had elapsed since Petitioner had terminated his employment. Thus, Whaley a former employee was suing Petitioner's insurance carrier, Traders and General Insurance Company (J. A. 256), and the matter was handled by Whaley's counsel and counsel for the defendant insurance carrier. Although it does not appear in the record herein, inasmuch as Petitioner's alternative request for a remand was denied, Whaley's deposition was taken by voluntary agreement between the parties to his workman's compensation suit, and was never filed with the state district clerk's office, which, as the Court knows, is a very common occurrence. Therefore, the deposition was not a matter of public record and Petitioner did not have access to it as such. The existence of such deposition was not discovered until after the hearing, even though the records in the district clerk's office were searched before the hearing.

The court below, under the statutory authority conferred under Section 10(e) of the Act, unquestionably had the authority and, under the facts of this case, the duty to remand these proceedings to the Board for the purpose of adducing this additional evidence. The court below in its *per curiam* opinion merely states that in its opinion the Board did not abuse its discretion in denying Petitioner's request for a remand. Petitioner's argument was not confined to the question of whether there had been an abuse of discretion on the part of the Board; rather, that the court itself exercise the statutory authority and duty imposed on it by Section 10(e) of the Act, and remand these proceedings for the purpose of adducing additional testimony as requested by Petitioner in its answer, brief and argument before the court. The evidence Petitioner seeks to adduce on the remand, i. e., Whaley's sworn deposition testimony, constitutes newly-discovered evidence which is of absolute vital importance because: (1) it shows that Whaley himself testified under oath in the deposition taken during the pendency of the case at bar that he was in fact terminated "because I was getting crippled and wasn't able to do as much as they wanted me to, to start with" (J. A. 248), and also that "I couldn't do heavy work" (T. 244); and (2) the statements therein clearly conflict with his testimony given at the Board hearing that he was physically able to perform his job duties (J. A. 32), which on occasion required the lifting of heavy objects (J. A. 33; 38). This testimony constitutes beyond reasonable doubt an admission by Whaley that he was not in fact physically able to perform his job duties and that he was discharged for that

reason. If he was so incapacitated, a finding that he was discharged for testifying adversely to Petitioner would have no basis in fact. The Court's attention is again respectfully directed to the vital fact that the injuries sustained by Whaley occurred *after* he testified at the Board hearing. Petitioner urges that the deposition testimony was presented to the Board in Petitioner's petition for reconsideration and motion for remand, that the Board actually had evidence of such conflicting testimony before it for its consideration, and that the Board denied said petition and alternative motion for the reason that nothing was presented therein which had not already been considered by the Board, and for the further reason that, as in the Board's opinion it was only related to a matter of compliance, it was premature. This finding is indeed strange and obviously in error because this evidence had not on any occasion at any prior time been before the Board. Therefore, Petitioner submits that the matter of Whaley's deposition testimony, although not adduced at the Board hearing, had been presented and made known to the Board, was considered by the Board, and was properly a part of the official record herein, as evidenced by the fact that the executive secretary of the Board included and certified it as a part of the record. In fact, the official certified record also includes the Board's order denying same and the affidavit of service of such order (T., pp. 12-13; 212, 250). Moreover, this evidence, regardless of whether considered by the Board, can properly be, and was, urged before the court under Section 10 (e) of

the Act as newly-discovered evidence by Petitioner's request made to the court below for a remand for the purpose of adducing such newly-discovered or additional evidence.

Petitioner contends that the court below had the authority, and duty under the facts herein, under Section 10(e) of the Act to remand these proceedings as requested regardless of whether the Board did or did not consider such evidence. Petitioner asserts that the Board's refusal to grant its request for a remand is not res judicata on the question of the court's power to adduce additional material evidence under Section 10(e) of the Act.

Petitioner would also, as a clear example of Whaley's lack of credibility, direct the Court's attention to certain sworn statements contained in his deposition testimony taken in his workman's compensation suit (T. 245). Therein Whaley, in describing an alleged whiplash injury received in an earlier automobile accident, admitted, in answer to a question inquiring if he alleged permanent disability in the personal injury suit instituted by him as a result of such whip-lash injury, that he claimed that "*I wasn't able to do the work I used to do* because it was too painful for me and I could not rest at night." (Emphasis added.) As a result of this lawsuit, Whaley "netted" $1,600.00, which in all probability means that total recovery before attorney's fees was in the amount of approximately $2,400.00. However, by Whaley's own statement, as clearly set forth in the exhibit, he admitted that he *continued to work right along performing regular work*. The pattern

is strikingly similar, because in this earlier case, as in the present case, Whaley was in effect talking from both sides of his mouth concerning his physical injuries and his ability to work.

The obvious intent of Congress in enacting Section 10(e) of the Act was to expressly provide for situations of the type involved herein in order that the record could be made factually complete where there is material newly-discovered evidence, and particularly so where there exists a strong possibility that an attempt is being made to subvert the purposes of the Act for personal gain.

Petitioner earnestly urges that the evidence it wishes to adduce upon the requested remand is evidence of "genuine substance"—as spoken of by the court in the *N. L. R. B. v. Houston Chronicle Pub. Co. case, 211 F. 2d 848 (C. A. 5)*—and evidence vital to a fair and equitable determination herein. As stated by the Court of Appeals for the Eighth Circuit in *Farmers Co-operative Company v. N. L. R. B., 208 F. 2d 296, at 303*, wherein that court was relying upon this Court's language in the *Universal Camera Corp.* case, it is the court's duty "to determine insofar as humanly possible what the truth is." This is the precise purpose that the remand would serve herein. Petitioner respectfully submits, using the language of this Honorable Court in the *Universal Camera Corp.* case *supra*, that a finding cannot "conscientiously" be made "that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including, the body of evidence opposed to the Board's view," where Petitioner

has newly-discovered evidence which it seeks to adduce on a remand which will clearly show: (1) that Whaley, the Board's only witness, was by his own admission terminated because of his physical inability to perform his duties, and (2) that his testimony at the Board hearing is not to be credited.

QUESTION 3—(Restated)

Whether the court erred in finding that Petitioner's conduct in terminating Whaley's employment constitutes an independent violation of Section 8(a)(1) of the Act.

Congress has provided in Section 8(a)(4) of the Act that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." It would, therefore, appear clear under this unambiguous language of the statute that if an employee is in fact discharged because he has given testimony at a Board hearing that his employer has by such conduct directly violated Section 8(a)(4) of the Act, and that any unfair labor practice based on such conduct must necessarily be predicated on this explicit Section of the Act.

The Board in this case specifically found that Whaley was discharged because he gave testimony adverse to Petitioner. However, the Board did not find that such conduct violated Section 8(a)(4) of the Act. Rather, the Board, without any evidence whatsoever of such fact, concluded that Petitioner's rank and file employees were, as a result of such conduct, subjectively restrained and coerced and

that such conduct therefore constituted an independent violation of Section 8(a)(1) of the Act. The Board stated in its decision that it was not necessary to consider whether Petitioner's conduct violated Section 8(a)(4) of the Act since the remedy would be the same (R. 203). Petitioner asserts that this finding is improper because under the facts of this case, where there is no evidence whatsoever disclosing any conduct which would cause rank and file employees to reasonably fear the same unlawful retaliatory action, the violation, if any, must be found under the section of the Act specifically making such conduct a violation. Obviously, the legislative intent of Congress in enacting the different sections specifically setting forth and defining the various unfair labor practices was that an unfair labor practice finding would be based upon the section of the Act specifically making such conduct illegal. Otherwise, and it would appear elementary, there would be no reason whatsoever for creating and spelling out in clear and unambiguous language the various and different types of unfair labor practice violations. In this case, the trial examiner followed the statute, and, accordingly, found that Petitioner's conduct violated Section 8(a)(4) of the Act, and that by virtue of such violation a derivative violation, using the Board's customary language, of Section 8(a)(1) had occurred. But the derivative Section 8(a)(1) violation is predicated entirely on the primary finding that there has been an independent violation of Section 8(a)(4) of the Act. As an example of independent and derivative violations, a finding that an employer has refused to bargain in good faith constitutes an independent violation of Section

8(a)(5) of the Act for the reason that that particular section specifically proscribes such conduct and makes its commission an unfair labor practice. Therefore, once it is determined that there has been a violation of Section 8(a)(5) of the Act, the Board and the courts conclude that by virtue of such independent violation there has also been a derivative violation of Section 8(a)(1) of the Act; i. e., that such unlawful conduct has also restrained, coerced, and interfered with the rights of the employees. However, the refusal to bargain does not in itself constitute an independent violation of Section 8(a)(1) of the Act. Rather, such finding of a derivative violation is predicated wholly on the primary finding that the refusal to bargain constitutes an independent violation of Section 8(a)(5) of the Act.

Here the Board merely found it unnecessary to consider whether the conduct complained of violated Section 8(a)(4) of the Act, stating that the remedy for the Section 8(a)(4) and 8(a)(1) violations are the same. However, a reading of the Board's remedial order and notice, which Petitioner is required to post for its employees, clearly shows that the remedy is not the same as it would be for a Section 8(a)(1) violation. The Board's order expressly provides that the Petitioner:

> "Cease and desist from:
>
> "(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employ-

ment or any term or condition of employment because he has given testimony under the Act;"

The notice which Petitioner is required to post provides:

> "We will not induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act."

Thus, the Board, although stating that the remedy is the same under its finding that Section 8(a)(1) has been violated, has obviously turned around and fashioned or drafted precisely the same type of order required to remedy a Section 8(a)(4) violation. In fact, the language in its remedial order follows closely the statutory language of Section 8(a)(4) (R. 204-207).

In support of its conclusion that Petitioner's conduct is violative of Section 8(a)(1) of the Act, the Board relied primarily on the *N. L. R. B. v. Talladega Cotton Factory, Inc.* case, *213 F. 2d 208, supra*, wherein the court below found that the willful discharge of supervisors because of their refusal to commit unfair labor practices against rank and file employees for an employer contravened Section 8(a)(1) of the Act. The facts of the *Talladega* case and this case are entirely inapposite. In the *Talladega* case the employer's strong anti-union animus was manifested by rampant violations of the Act, to-wit: unlawful interrogation, widespread threats, discriminatory demotion, discriminatory discharges of rank and file employees, and the discharge of supervisory employees for refusing to commit

unfair labor practices against rank and file employees. In the record of this case there is *no evidence* whatsoever of any anti-union animus. In the *Talladega* case the Board concluded that the "net effect" of the discharge of the supervisory employees "was to cause non-supervisory employees reasonably to fear that the [employer] would take similar action against them." However, none of the acts complained of in the *Talladega* case was committed herein.

Thus, in the *Talladega* case the court was concerned with acts that directly contravened Section 8(a) (1) of the Act, and the court was not required to apply what might be termed subjective tests, because the obvious and direct result of the employer's conduct was to "interfere with, restrain, or coerce employees in violation of Section 8(a) (1) of the Act. However, Petitioner submits that under the record evidence herein, where no rank and file employee was told or had any reason to believe that the discharge of a supervisor was caused by the reason of his having testified at a Board hearing, there can be no independent violation of Section 8(a) (1) of the Act. Petitioner contends that under the facts of this case no employee could reasonably attribute the discharge of Whaley to his prior adverse testimony, or fear the same treatment, or foresee or reasonably infer the same consequence. Using the theory of the *Talladega* case, there was no conduct by Petitioner to "cause non-supervisory employees reasonably to fear that Petitioner would take similar action against them."

Petitioner respectfully directs the Court's attention to the recent *Pedersen v. N. R. L. B.* case, *234 F. 2d 417*

(C. A. 2), which is the only other case Petitioner can find wherein a somewhat similar factual situation was involved, and similar then only to the extent that Pederson was a supervisory employee who allegedly was discharged for answering a subpoena and giving testimony under the Act. In the *Pederson* case, the trial examiner, like the trial examiner in this case, found that the employer's conduct constituted a violation of Sections 8(a) (4) and (1) of the Act. The Board, before passing on the trial examiner's intermediate report in the *Pedersen* case, promulgated new and stricter jurisdictional requirements, and dismissed the complaint without giving consideration to the merits of the case because the employer did not meet such new jurisdictional standards. The Second Circuit, however, in considering the case, specifically noted that by Section 8(a) (4) of the Act "Congress has made it an unfair labor practice for an employer 'to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter'." The court concluded that "the protection afforded by Section 8(a) (4) is coextensive with the power to subpoena, and that the Board, while it "may limit the number of its cases by appropriate criteria, it may not, however, consider a matter without also asserting jurisdiction over the Section 8(a) (4) complaints which are incident to it." The court, accordingly, remanded the case to the Board for further consideration. The *Pedersen* case, therefore, serves as precedent for the proposition that if a finding is made that a supervisor was discharged because he testified adversely

to the interests of his employer at a Board hearing, that the unfair labor practice finding must be based on Section 8(a)(4) of the Act. Thus, the decision of the Second Circuit in the *Pedersen* case conflicts with the decision of the Fifth Circuit herein which finds only an independent violation of Section 8(a) (1) of the Act. This conflict which exists between the Second and Fifth Circuits can, of course, only be resolved by this Honorable Court.

QUESTION 4—(Restated)

Whether the court erred in denying Petitioner's request that the Board's order, which orders full and immediate reinstatement to Whaley in his former or a substantially equivalent position, be modified to provide that such reinstatement be contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work.

Unless the Board's order is modified to provide that Whaley's reinstatement be made contingent, as to the actual time of reinstatement, upon his physical ability to perform required job duties when reinstated, Petitioner is compelled to immediately reinstate Whaley in a job which he may not physically be able to perform if he has not fully recovered from his injuries, and thereby possibly cause additional physical harm to be done to him or, as a result of his incapacity, to other employees for which Petitioner would, of course, be financially responsible and liable. Petitioner again respectfully points out that in his workman's compensation suit, Whaley alleged total and permanent or, alternatively, partial and permanent

disability; that settlement based on such injuries was had in the amount of $2,602.50, which represents or is equal to under the Texas workman's compensation law then in effect, which allowed $25.00 a week for each week of disability, the amount he would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. The Board, fully recognizing that Whaley had suffered physical injury prior to his termination, provided in its order that back pay was to be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (T. 204); however, the Board's order failed to provide that reinstatement would, as to the actual time of reinstatement, be contingent upon Whaley's being physically able to perform his job duties at such time. Thus, Petitioner is compelled to reinstate Whaley without any showing by him that he is physically able to perform duties required of him. Such reinstatement without a prior showing of physical qualification constitutes a deprivation of due process under the Constitution.

QUESTION 5—(Restated)

Whether the court, under the record facts, erred in entering the decree ordering Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the N. L. R. B.

The evidence in this record shows conclusively that in the conversations between Whaley and L. M. Everett, Sr.,

and between Whaley and counsel for Petitioner, Whaley was requested to change his testimony so as to *tell the truth*. Whaley himself admits this. When asked on cross examination, "Well, did he tell you in so many words that he wanted you to tell the truth, didn't he?" Whaley replied, "Yes, sir, he wanted the truth." (J. A. 75.) Further:

> "Q. Did Mr. Everett try to get you to tell—Did he tell you to tell a lie or anything? (J. A. 30.)
>
> "A. No, sir, he didn't ask me to tell a lie.
>
> * * * * * *
>
> "Q. He did not believe it, did he?
>
> "A. He didn't believe it was said." (J. A. 31.)

When asked, "What did you tell Mr. Bonney, if anything?" he replied, "Well, he kept on wanting me to tell him the truth about the situation and wanted to know if I wouldn't change my statement and that they would draw up a plan for me to sign that if I didn't think Jack said that in a joking manner, or did I—that I had decided that he didn't mean what he had said" (J. A. 23).

It seems unprecedented that the court could, under *this evidence*, conclude that Petitioner has done any unlawful act in attempting to have the truth told by the witness. Is not the *Truth* the cornerstone upon which justice is rendered? This is not an inconsequential matter. It is of such importance that it shakes the very foundation of our judicial system and thus our democracy.

Petitioner, therefore, respectfully requests that the court's decree be modified to eliminate such cease and desist order.

CONCLUSION

WHEREFORE, your Petitioner prays that a writ of Certiorari issue under the seal of this court, directed to the Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that upon such review the decree of said court be set aside or, alternatively, that the cause be remanded for the taking of additional evidence, or that the court's decree be modified, as requested herein, and for such further relief as to this Court may seem proper.

Dated August 23, 1957.

Respectfully submitted,

BONNEY, WADE & STUBBLEFIELD,

By W. W. Wade

Of Counsel:

HERBERT S. BONNEY

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

Copies of this Petition for Writ of Certiorari have been served upon the Solicitor General of the United States and the General Counsel of the National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

* * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board

may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or cer-

ification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

D-9837

Dallas, Texas

DECISION AND ORDER

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts his findings, conclusions and recommendations with the modifications and exceptions noted below.

We agree with the Trial Examiner that the Respondent discharged Whaley because he gave testimony adverse to its interests in an earlier Board proceeding (Case No. 16-CA-742),[1] and not because of his asserted deficiencies as a

[1] We do not adopt the Trial Examiner's finding which indicates that Whaley was also discharged for his Union sympathies. Not only is this ground not urged as a reason for the discharge, but the record does not support such a finding.

supervisor, as the Respondent contends.[2] We find, as did the Trial Examiner, that this conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organizational rights within the meaning of Section 8(a)(1) of the Act. In our opinion, the net effect of Whaley's discharge was to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank and file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act

[2] In finding that the Respondent's asserted reasons for Whaley's discharge were a pretext, the Trial Examiner, among other things, gave little weight to the oral testimony given by the Respondent because the best evidence was the written records which were not produced. Contrary to the Respondent's contention, the Trial Examiner did not mislead the Respondent into not producing these records. A reading of the entire colloquy between the Trial Examiner and counsel discloses that the records were not produced voluntarily and that the parties understood that the nonproduction of the records would affect the weight to be given to the oral testimony.

For the purpose of correcting and clarifying certain statements in the Intermediate Report, we note that Luther M. Everett, Jr., the Respondent's vice-president, testified that he called Whaley's attention to his errors in record keeping, but that he never threatened him with discharge for these errors. We also note that Whaley did not expressly deny spreading a rumor that the Respondent was ruining his health. However, when questioned under cross-examination whether he had admitted to Thomas Everett at the time he was reprimanded for circulating this rumor that he had said "some things like that," Whaley testified that he did not say "ruining my health—because I didn't say it that way." In addition, the Trial Examiner inadvertently failed to mention that Whaley denied that he circulated a rumor about the Union getting employees a raise, although the Trial Examiner stated that he believed Whaley and disbelieved employee Cribbs who testified to the rumor.

adverse to their employer. For these reasons, we find that Whaley's discharge violated Section 8(a)(1) of the Act.[3] In view of this determination, and as the remedy, which we discuss below, would be the same, we find it unnecessary to consider whether the discharge also violated Section 8(a)(4) of the Act.

The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist from its unlawful conduct and take affirmative action necessary to effectuate the policies of the Act.

We have found, in agreement with the Trial Examiner, that Whaley's discharge interfered with, restrained and coerced nonsupervisory employees in the exercise of their statutory rights. Therefore, in order to restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act, we shall provide for Whaley's reinstatement with back pay, as prescribed in the Intermediate Report.[4] However, in accordance with the Board's customary policy, back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties.

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[3] *Cf. N. L. R. B. v. Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 215-217 (C. A. 5), *enforcing* 106 N. L. R. B. 295, 295-297; *N. L. R. B. v. Vail Mfg. Co.*, 158 F. 2d 664, 666-667 (C. A. 7), *enforcing* 61 N. L. R. B. 181, 182-183, *cert. denied* 331 U. S. 835; *Inter-City Advertising Company*, 89 N. L. R. B. 1103, 1106-1108, *enforcement denied on this point on other grounds*, 190 F. 2d 420, 422 (C. A. 4).

[4] *N. L. R. B. v. Talladega Cotton Factory, Inc.*, supra; *Inter-City Advertising Company*, supra.

We shall further enjoin the Respondent from in any other manner infringing upon its nonsupervisory employees' rights guaranteed in Section 7 of the Act. We find that such an order is necessary to satisfy the remedial objectives of the Act because the Respondent's unfair labor practices reveal an attitude of opposition to the purposes of the Act.[5]

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America,

[5] Cf. *N. L. R. B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 536 (C. A. 4).

AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge; in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order herein;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto as an appendix.* Copies of said notice to be furnished by the Regional Director for the

*In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, as to what steps it has taken to comply herewith.

Dated, Washington, D. C. April 30, 1956.

Boyd Leedom, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member
Philip Ray Rodgers, Member
Stephen S. Bean, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding

before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order issued in this case.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

ORDER

(Number and Title Omitted)

On April 30, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on July 23, 1956, the Respondent filed a petition for reconsideration of the said Decision and Order, and, in the alternative, a motion for remand. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said petition for reconsideration be, and it hereby is, denied on the ground that nothing has been advanced that was not previously considered by the Board; and

IT IS FURTHER ORDERED that the alternative motion for remand be, and it hereby is, denied as it relates to a question of compliance and is therefore premature at this time.

Dated, Washington, D. C., Aug. 10, 1956.

By direction of the Board:

Frank M. Kleiler
Executive Secretary

[1] 115 N. L. R. B. No. 186.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

BETTER MONKEY GRIP COMPANY,

Respondent.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(May 1, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: The National Labor Relations Board, pursuant to Sec. 10e of the National Labor Relations Act (29 U. S. C. A. 151, et seq.), seeks enforcement of its order.[1]

[1]Substantially to the effect that respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Inducing or attemping to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating

The respondent insists: (1) that the Board's factual findings are not supported by substantial evidence; (2) that the Court should remand the proceedings for the purpose of adducing additional testimony; and (3) that the Board's conclusion that respondent's conduct violated Sec. 8(a)(1) of the Act was improper.

For reasons sufficiently appearing in the Board's decision, we are of opinion that substantial evidence on the record as a whole supports its finding that respondent discharged supervisor Robert L. Whaley because he gave testimony adverse to its interests in a prior Board proceeding, and that the Board did not abuse its discretion in denying the respondent's motion that the case be remanded for the purpose of taking additional evidence. We further hold that, under the evidence in the record, the Board was warranted in concluding that the discharge of a supervisor for testifying under the Act interfered with, restrained

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against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, etc.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, etc.;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, etc. necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto, etc.

The Board's decision and order are reported at 115 N. L. R. B. No. 180.

and coerced nonsupervisory employees in violation of Sec. 8(a)(1) [See *N. L. R. B. v. Talladega Cotton Factory, Inc.*, 5th Cir., 213 F. 2d 209, 215-217.], and that a contrary conclusion is not required by Section 8(a)(4) of the Act. *Compare Pedersen v. N. L. R. B.*, 2nd Cir., 234 F. 2d 417.

The order is therefore

ENFORCED.

ORDER DENYING REHEARING

Extract from the Minutes of May 29th, 1957.

No. 16278

NATIONAL LABOR RELATIONS BOARD,

versus

BETTER MONKEY GRIP COMPANY.

The petition for rehearing in the above entitled and numbered cause is hereby DENIED.

CLERK'S OFFICE:
A TRUE COPY:—

(Seal)

Clerk, U. S. Court of Appeals
Fifth Circuit.

New Orleans, La.,
July 13, 1957.

(Original Filed—June 18, 1957.)

No. 16278

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BETTER MONKEY GRIP COMPANY,

Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Borah, Rives & Brown, Circuit Judges.

By the Court:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its Order dated April 30, 1956. The Court heard argument of respective counsel on April 9, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 1, 1957, the Court being fully advised in the premises, handed down its decision enforcing the said Order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National

Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the National Labor Relations Act, as amended (hereinafter called the Act).

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, in the manner set forth in "The Remedy" section of the Intermediate Report of the Trial Examiner of the National Labor Rela-

tions Board dated January 11, 1956, as modified by the Board's Decision and Order dated April 30, 1956.

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Decree.

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Sixteenth Region, Fort Worth, Texas, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, as to what steps it has taken to comply herewith.

ENTERED: JUN. 18, 1957

CLERK'S OFFICE:—
A TRUE COPY:

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, La., July 15, 1957

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals, enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in

"The Remedy" section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated January 11, 1956, as modified by the Board's Decision and Order dated April 30, 1956, issued in this case.

BETTER MONKEY GRIP COMPANY
Employer

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.